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No. 90-1197

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

DAVID L. FITZ,
Petitioner,

v.

COMMUNICATIONS WORKERS OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION

JOHN H. CURLEY
Room 1107 E
1 Speedwell Avenue
Morristown, NJ 07960
Attorney for AT&T Communications, Inc.

JAMES B. COPPESS
Suite 411
1925 K Street, N.W.
Washington, D.C. 20006

LAURENCE GOLD
(Counsel of Record)
815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5390
Attorneys for the Communications Workers of America

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

1. This case arises out of AT&T Communications, Inc.'s May 1986 discharge of David Fitz from employment. Pet. App. 4a. The basis for the discharge was Mr. Fitz's refusal to make the agency fee payments required as a condition of employment by the collective bargaining agreement between AT&T and the Communications Workers of America (CWA or Union) covering the bargaining unit in which Mr. Fitz worked. Pet. App. 3a. Mr. Fitz's stated reason for refusing to pay agency fees to the CWA is that he believed that the CWA had not given sufficient

support to a strike by the International Brotherhood of Electrical Workers that occurred while Mr. Fitz belonged to that union. Pet. 4 n. 3. AT&T's actions in this regard were at the request of CWA, which was suffering the loss of the contractual protections contained in the collective bargaining agreement by reason of Mr. Fitz's refusal to make the required agency fee payments.

2. In October 1986, an attorney representing Mr. Fitz filed charges with the National Labor Relations Board (NLRB) against AT&T and CWA Local 4251 alleging that the discharge constituted an unfair labor practice under the National Labor Relations Act (NLRA). D.C. Cir. App. 18-19.[1] In November 1986, the Director for NLRB Region 33 determined that the charges lacked merit. D.C. Cir. App. 20. The Regional Director found that the Union had met its legal obligations by notifying Mr. Fitz of the amounts owed and giving him a reasonable opportunity to pay those amounts, and that Local 4251 had not breached its duty of fair representation by refusing to file a grievance over Mr. Fitz's discharge. D.C. Cir. App. 20-21.

In December 1986, Mr. Fitz's attorney appealed the Regional Director's decision to the General Counsel of the NLRB. D.C. Cir. App. 23-37. In January 1987, the General Counsel, acting through her Office of Appeals, sustained the Regional Director's decision to dismiss the charges. D.C. Cir. App. 38-39. In this regard, the General Counsel found that "the evidence indicated that the Union advised Fitz of his obligations and that he admittedly did not respond to the Union's December 1985 letter on this matter or pay the required dues or its equivalent." D.C. Cir. App. 38. Responding to the contention that forms the basis of Mr. Fitz's claims in the instant case, the General Counsel further explained that "the evidence did not indicate that [Mr. Fitz] advised the

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[1] Citations in the form "D.C. Cir. App." are to the appendix in the court of appeals.

Union of [any] objections" to the payment of full union dues. D.C. Cir. App. 38-39.[2]

More than a year later, in March 1988, a second attorney appeared for Mr. Fitz, and requested that the NLRB's General Counsel reconsider her decision sustaining the Regional Director's dismissal of the unfair labor practice charges. D.C. Cir. App. 40-42. In April 1988, the General Counsel denied this request as untimely under the Board's regulations. D.C. Cir. App. 43-44.

3. In May 1988, two years after his discharge, Mr. Fitz filed the instant lawsuit in the United States District Court for the District of Columbia. Pet. App. D. The complaint alleges that AT&T, by discharging Mr. Fitz, and CWA, by requesting his discharge, violated his rights under the First Amendment and under § 7 of the NLRA. Pet. App. 27a. The complaint also alleges that the NLRB's General Counsel and her assistant violated Mr. Fitz's statutory and constitutional rights by not holding his charge in abeyance pending this Court's decision in *Communications Workers v. Beck*, 487 U.S. 735 (1988). Pet. App. 28a.

On August 17, 1989, the district court (Lamberth, J.) entered an order dismissing Mr. Fitz's complaint with

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[2] At the time of Mr. Fitz's discharge, CWA maintained a procedure whereby employees paying agency fees could object to providing financial support to the Union's "nonrepresentational" activities, and receive a pro rata refund for nonrepresentational expenditures after the Union's books were audited. Part of the objecting employee's fee was held in escrow until the refund was paid and any challenge to the amount of the refund completed. The Union has since adopted a system of providing objecting fee payers an *advance reduction* of their fee payments. *See Abrams v. Communications Workers of America*, 702 F.Supp. 920, 923-924 (D.D.C. 1988), *aff'd mem.*, 884 F.2d 628 (D.C. Cir.), *cert. denied*, —— U.S. ——, 110 S.Ct. 540 (1989). *See also Abrams v. Communications Workers of America*, D.C. Cir. No. 88-7234, Appendix to Brief of Appellant pp. 62-90 (describing CWA's objection procedure). Mr. Fitz has not alleged that he invoked the Union's objection procedure.

prejudice. Pet. App. 21a-22a. The district court ruled that the constitutional claims against CWA and AT&T failed because the administration of a collective bargaining agreement between a private employer and a private labor organization does not involve state action. Pet. App. 5a-6a. That court also ruled that the statutory claims under the NLRA against CWA and AT&T were barred by the six month limitations period in NLRA § 10(b), 29 U.S.C. § 160(b). Pet. App. 6a-10a. Finally, the district court determined that there was no jurisdiction over Mr. Fitz's claims against the NLRB's General Counsel and her assistant in their official capacities for their handling of Mr. Fitz's unfair labor practice charges, Pet. App. 10a-17a, and that these defendants had immunity from Mr. Fitz's claims against them in their individual capacities, *id.* 17a-20a.

On October 30, 1990, the United States Court of Appeals for the District of Columbia Circuit (Mikva, Edwards & Silberman, JJ.), affirmed the decision of the district court. After hearing oral argument from the parties, the appellate court entered an order holding: "For the reasons discussed fully in Judge Lamberth's fine Memorandum Opinion, filed August 17, 1989, we find that these claims lack merit and were properly dismissed." Pet. App. 1a-2a.

ARGUMENT

1. The sole question raised by the petition for *certiorari* is whether the cause of action established in *Communications Workers v. Beck*, 487 U.S. 735 (1988), is governed by the six month limitations period in § 10(b) of the National Labor Relations Act, as amended (NLRA). This Court's decision in *DelCostello v. Teamsters*, 462 U.S. 151 (1983), makes it plain that the courts below answered that question correctly in holding that NLRA § 10(b) does bar Mr. Fitz's statutory claims under *Beck*.

In *Beck*, this Court held that NLRA § 8(a)(3) contains an implied limitation on the expenditure by a union of agency fees collected from objecting nonmembers. 487 U.S. at 738 & 762-763. An objecting nonmember may assert his rights under *Beck* by filing unfair labor practice charges with the NLRB or by bringing a federal court action alleging breach of the fair representation duty. *Id.* at 742-744.

The statutory claim identified in *Beck* arises directly from NLRA § 8—the Act's provision defining "unfair labor practices." *See* 29 U.S.C. § 158. And NLRA § 10(b) by its terms establishes a six month limitations period on claims alleging unfair labor practices under § 8 of the Act. 29 U.S.C. § 160(b). It is clear that this limitations period would govern any charges filed with the NLRB alleging the § 8(a)(3) violation identified in *Beck*, and Mr. Fitz has not even attempted to argue to the contrary.

As we have noted, a *Beck* claim can, in the alternative, be brought through a federal court suit alleging a fair representation breach. That alternative does not change the limitations period applicable to the underlying substantive claim.

In *DelCostello v. Teamsters*, *supra*, the Court held that the "family resemblance" and "substantial overlap" be-

tween breaches of the fair representation duty and unfair labor practices justifies applying the six month limitations period in § 10(b) to "hybrid § 301/fair representation" lawsuits. 462 U.S. at 170. The example cited to illustrate the "substantial overlap" between fair representation and unfair labor practice claims, demonstrates that § 10(b)'s limitation period applies here. In this regard, *DelCostello* notes that "[m]any fair representation claims . . . would be unfair labor practices under § 8(b)(1) or (2)." 462 U.S. at 170.

This case concerns just such a claim. Mr. Fitz's charge against AT&T is that the employer violated NLRA § 8(a)(3) by discharging him. This statutory provision defines one of the "unfair labor practices by employers," 29 U.S.C. § 158(a), that is subject to § 10(b). The plaintiff's claim against CWA, in turn, is that the Union breached its duty of fair representation by requesting that AT&T discharge the plaintiff, i.e., that CWA caused AT&T to discharge the plaintiff in violation of § 8(a)(3). That claim against the Union expressly alleges a violation of NLRA § 8(b)(2). Indeed, in this case, Mr. Fitz sued the NLRB General Counsel for refusing to issue a complaint against CWA alleging just such a violation.

Thus, Mr. Fitz's claim presents a paradigm example of the "overlap" between the duty of fair representation and the NLRA's unfair labor practice provisions relied upon by the *DelCostello* Court in applying § 10(b) to hybrid fair representation/§ 301 cases. Plainly then, as the courts below recognized, *DelCostello* governs in this case as well.

Against all this, Mr. Fitz argues that *DelCostello* applies only "to bar garden variety grievances which are tardily filed." Pet. 17. Every circuit to have considered this argument has ruled to the contrary. In so doing, the courts of appeals have "decline[d] . . . to adopt a rule that would permit varying statutes of limitation for a claim of breach of the duty of fair representation . . . de-

pending solely upon the facts pleaded in the complaint." *Kalombo v. Hughes Market, Inc.*, 886 F.2d 258, 259 (9th Cir. 1989). *Accord Richardson v. Steelworkers*, 864 F.2d 1162, 1167 (5th Cir. 1989), *cert. denied*, —— U.S. ——, 110 S.Ct. 2204 (1990); *Eatz v. I.B.E.W. Local 3*, 794 F.2d 29, 33 (2d Cir. 1986); *Erkins v. Steelworkers*, 723 F.2d 837, 839 (11th Cir.), *cert. denied*, 467 U.S. 1243 (1984). These circuit courts have recognized that "[t]he chaos that would flow from such a doctrine would undo the certainty in the applicable statute of limitations achieved by the Supreme Court in *DelCostello*." *Kalombo*, *supra*, 886 F.2d at 259.[3]

Mr. Fitz would counterpose *Reed v. United Transportation Union*, 488 U.S. 319 (1989), to *DelCostello*, Pet. 19, but the two decisions are not at all in conflict. In *Reed*, the Court declined to apply NLRA § 10(b) to a claim under § *101(a)(2) of the Labor-Management Reporting*

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[3] Mr. Fitz relies on *Adams v. Gould, Inc.*, 739 F.2d 858 (3d Cir. 1984), *cert. denied*, 469 U.S. 1122 (1985), as contrary to this line of circuit court precedent. Pet. 18-19. The Third Circuit's opinion belies any such conflict.

Adams applied the three year limitations period found in the Employment Retirement Income Security Act (ERISA) to a claim that an employer had underfunded its pension trust in breach of its collective bargaining agreement. There was a fair representation aspect to the employees' suit against their employer, because the dispute over pension funding had arguably been settled by an arbitration award. *Id.* at 861. The Third Circuit, however, found the pension claim in *Adams* to be more like those covered by ERISA's provisions than like those covered by the NLRA unfair labor practice provisions. The court of appeals further justified applying the longer ERISA limitations period by noting that "the immediate effect of the [pension funding] dispute on the day-to-day labor-management relationship is slight," and "delay in resolving disputes concerning those interests does not disrupt labor-management relations." *Id.* at 867.

Since there is a precise overlap between Mr. Fitz's fair representation claim and the claim he attempted to assert through an unfair labor practice charge, and since enforcement of the agency shop agreement is very much a matter of day-to-day labor relations, the decision in *Adams* is not in conflict with the decision below or the authorities cited in the text.

and Disclosure Act (LMRDA) on the ground that the LMRDA "implements a federal policy . . . that simply had no part in the design of a statute of limitations for unfair labor practice charges." 488 U.S. at 332. Thus, *Reed* reaffirms the proposition that NLRA § 10(b) provides the appropriate limitations period on claims that *are* in substance unfair labor practices. And the statutory claims in this case are based on NLRA § 8, which does, in terms, define "unfair labor practices."

Curiously, Mr. Fitz's also argues that his claim implicates the "policy of voluntary unionism" discussed in *Pattern Makers v. NLRB*, 473 U.S. 95, 105 (1985). Pet. 19 & n. 67. But the claim in *Pattern Makers* was made pursuant to NLRA § 8(b)(1), was subject to the jurisdiction of the NLRB, and was indisputably covered by § 10(b).

2. The constitutional issue discussed in the argument section of the petition, pp. 8-15, is not fairly encompassed by the question presented. Sup. Ct. Rule 14.1 ("Only the questions set forth in the petition, or fairly included therein, will be considered by the Court."). The only question presented by the petition for *certiorari* concerns the appropriate statute of limitations in *Beck* cases. Pet. i. It is thus decisive here that, while the courts below dismissed Mr. Fitz's statutory claims on timeliness grounds, the lower courts dismissed his constitutional claims *on the merits*. Pet. App. 6a. That being so, the constitutional aspect of this case raises no timeliness issue at all.

Out of what may be an excess of caution, we also note that the decisions below do not in this respect raise any issue worthy of this Court's attention. Mr. Fitz's constitutional claims were dismissed on the ground "that a collective bargaining agreement between a private employer and a private union did not involve state action." Pet. App. 6a.

The "most fundamental[]" lesson of this Court's "state action" precedents is "that a government normally can be held responsible for a private decision only when it

has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the government." *San Francisco Arts & Athletics v. U.S. Olympic Committee*, 483 U.S. 522, 546 (1987) (internal quotation marks and brackets omitted). Since the NLRA encourages free collective bargaining between employers and unions, and does not require the inclusion of agency shop clauses in the resulting agreements, the choice to include such a clause clearly cannot "be deemed to be that of the government."

It, therefore, comes as no surprise that, since *Beck*, the courts that have considered constitutional claims of the sort raised by Mr. Fitz have found such claims to fail for want of state action. *Abrams v. Communications Workers of America*, 702 F.Supp. 920, 921-923, 925-926 (D.D.C. 1988), *aff'd mem.*, 884 F.2d 628 (D.C. Cir.), *cert. denied*, —— U.S. ——, 110 S.Ct. 540 (1989); *Price v. International Union, U.A.W.*, 722 F.Supp. 933, 936-937 (D.Conn. 1989), *appeal pending*, No. 90-7652 (2d Cir.).

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

JOHN H. CURLEY
Room 1107 E
1 Speedwell Avenue
Morristown, NJ 07960
Attorney for AT&T Communications, Inc.

JAMES B. COPPESS
Suite 411
1925 K Street, N.W.
Washington, D.C. 20006
LAURENCE GOLD
(Counsel of Record)
815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5390
Attorneys for the Communications Workers of America